

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

INTEGRATED COMMUNICATIONS &  
TECHNOLOGIES, INC., et al.,

Plaintiffs,

Civil Action  
No. 16-10386-LTS

V.

July 12, 2019

HEWLETT-PACKARD FINANCIAL  
SERVICES COMPANY, et al.

3:12 p.m.

Defendants.

TRANSCRIPT OF STATUS CONFERENCE

BEFORE THE HONORABLE LEO T. SOROKIN

UNITED STATES DISTRICT COURT

JOHN J. MOAKLEY U.S. COURTHOUSE

## 1 COURTHOUSE WAY

BOSTON, MA 02210

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## PROCEEDINGS

(The following proceedings were held in open court before the Honorable Leo T. Sorokin, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts, on July 12, 2019.)

THE CLERK: Case number 16-10386, Integrated Communications & Technologies v. Hewlett Packard.

Would counsel please state your name for the record.

MR. MCGUIRE: Good afternoon. Josh McGuire on behalf of plaintiffs.

MR. JOFFE: Good afternoon, your Honor. Dmitry Joffe on behalf of plaintiffs as well.

THE COURT: Good afternoon.

MR. CALLAGHAN: Good afternoon, your Honor. Anthony Callaghan and Paul Saso from Gibbons PC on behalf of defendants.

THE COURT: Good afternoon.

MR. EDGARTON: Good afternoon, your Honor. Mark Edgerton from Choate on behalf of defendants.

THE COURT: What's the matter, Mr. Bunis doesn't work on Fridays in the summer?

MR. EDGARTON: He's golfing.

THE COURT: That's what happens when you work in the private sector, I guess.

1               Okay. So I read the request for a status report.

2               Let me just summarize what I understand the defendants  
3 are asking for, and then I'll -- if I don't have it right, you  
4 tell me, I'll hear from the two of you what you think.

5               What I essentially hear them saying, Mr. McGuire and  
6 Mr. Joffe, you were late, they don't really ask for a whole lot  
7 of relief from your being late, but they say you're late, but  
8 you were late where the wale came after the minnow. The minnow  
9 was 2,700 and the wale was 770,000 pages, and the wale came a  
03:14 10 couple of days late. But they don't really complain about that  
11 other than to say the July 22nd date for motions to compel  
12 might be a little tight for them. But, really, it sounds like  
13 they say tight for them, less so much about the three days. So  
14 I'm not really focused on the timing issue. Unless I'm  
15 misreading their papers, I don't really hear them -- they raise  
16 that what it means as the case cascades forward.

17               Really what I hear them saying is the 770,000 pages is  
18 to, quote-unquote, data dump, is the word they use, but that  
19 it's filled with lots of irrelevant and nonresponsive material  
03:14 20 and that you're not entitled to do that. That, yes, they would  
21 concede, I think from reading it, that all of these documents  
22 popped up from the search terms that they selected, and when I  
23 read the letters you told them you were getting a lot of  
24 documents with these search terms. And they tweaked it a  
25 little bit but that didn't make a fundamental difference in

1       terms of the amount of documents that came up. So they say,  
2 Hey, we're buried with a lot of garbage, and it's unfair and  
3 unreasonable to force us -- to shift to us the burden to ensure  
4 that these are responsive documents. So, unfair. They say  
5 they want a solution. They propose this indexing solution as a  
6 form of a solution. They say that would do it for them, or  
7 they want some other solution.

8                     So I suppose the question is, are they right? Why  
9 aren't they right? If they're not right, there's nothing to  
03:15 10 do; and if they are right, why shouldn't they do what they want  
11 or do something -- if I should do something else, what should I  
12 do.

13                    MR. MC GUIRE: I think that's an accurate summary of  
14 the complaints they have that brought us to this point.

15                   There's a few corrections I could make to their  
16 recitation of the events that led to this point, but I think  
17 that if we just start with the fundamental question that's  
18 before you at this moment, that's probably the best place to  
19 begin. Are they entitled to have the plaintiffs index the  
03:16 20 entire production in the way that they have described and  
21 proposed.

22                   THE COURT: So step back a little bit, sort of bring  
23 the question back a little more generally, because this is the  
24 way I think about it. I'm not sure -- what I understand the  
25 indexing is a method that they propose to remedy what they say

1 is not right, which is, they say, dumping 770,000 pages of  
2 which has a lot of nonresponsive documents in it, that's what  
3 they say. So before we get to the question of whether they can  
4 do that, the way I see this if you were -- if you were -- if  
5 the 770,000 pages you gave them is a reasonable response to the  
6 document requests made and is by and large responsive  
7 documents, not every single page, I'm sure there's some pages  
8 that aren't -- but I don't understand them to be saying that --  
9 that then I'm not imposing any remedy and I don't need to think  
03:17 10 about whether indexing is right. On the other hand, if this is  
11 like a dump of a lot of stuff and there's thousands of  
12 nonresponsive documents, then some sort of remedy is needed,  
13 and then the question is what? Maybe the one they propose,  
14 maybe not the one they propose, maybe a different one. So I'm  
15 wondering, first, should there even be a remedy, or -- and  
16 then, if so, what do we talk about.

17 MR. McGUIRE: Okay, I'll start with that question.  
18 The term "dump" is a term that I disagree with because it has  
19 pejorative connotations that it was done intentionally for the  
03:17 20 purposes of obscuring relevant, responsive documents; that was  
21 not its purpose. But it is the case that there are a  
22 substantial quantity of nonresponsive documents in the  
23 production; we don't disagree with that.

24 The best way to deal with that situation is the  
25 question of whether or not that should be their responsibility

1 or the plaintiffs' responsibility to cull out the documents  
2 that are not responsive, not germane, and to get to the sort of  
3 heart of the fruit of the production.

4 We believe that they are in a much better position to  
5 do that for any number of reasons that we can get to in a  
6 little bit. But as to the actual premise as to whether or not  
7 there is a large production, there is. Are those documents  
8 responsive --

9 THE COURT: A large production or a large  
03:18 10 production -- a large number of nonresponsive --

11 MR. JOFFE: A large number of documents that I think  
12 we would agree are not responsive to the requests, but they are  
13 responsive to the search terms that the defendants selected  
14 initially that we didn't push back on initially and then, when  
15 it became clear that there are were a large number of hits  
16 coming to these documents, we attempted to push back some.

17 There was some further negotiation and refinement of  
18 some of those terms, and with respect to some others, the  
19 defendants took the position that the term was fine as is and  
03:19 20 we should keep it, including such a broad term as "H3C," which  
21 I note, sort of ironically, that is one of the ones that they  
22 specifically complained about in the motion that brought us  
23 here today. That's a term that we tried to tell them was  
24 entirely too broad, given that there were other sources of  
25 business lines that included those sorts of machines, and that

1       that was producing a very large volume of hits. They complain  
2       in their papers, Hey, if we try to search "H3C" within this  
3       mess, we get a large number of hits. Of course you do.

4           So all of the documents that have been provided to  
5       them were responsive to the search terms that they crafted and  
6       we then further negotiated. The question is how to best narrow  
7       beyond the universe of documents that are responsive to those  
8       hits.

9           It is, under the circumstances, it was, not practical  
03:20 10      for the plaintiffs to review each and every document for  
11       responsiveness to their requests before producing it. I don't  
12       think that that's something that we are obligated to do. I've  
13       asked the defendants several times to point me to some source  
14       of that obligation; they've not been able to do so. And the  
15       question then is if you have to have some mechanism for  
16       reviewing those documents, either page by page or by some  
17       further set of search terms, I think it's the defendants who  
18       are in the best position to do that, both in terms of their  
19       resources and in terms of being able to craft a solution that  
03:20 20      targets the documents that they, in fact, truly care about.

21           The page count number that they continue to use in  
22       their papers and in hearings is a little bit misleading. The  
23       actual number of documents, not pages, is just under 230,000.  
24       I know that they had said something the last time that we were  
25       in this room about the math associated with what it would take

1 to review those. My own back of the envelope says that 20  
2 seconds per document, which I think is a long time to do a  
3 document review, collection, where you're looking at spam, but  
4 even at 20 seconds per document, it would take eight people  
5 reviewing full time four weeks. Four weeks is how long they've  
6 had the documents. If they had hired eight contract attorneys  
7 and had them review every document before now, we'd be done.

8 So -- and I'm not suggesting that that's necessarily  
9 the best way to do it, because I think that very easily, given  
03:21 10 what they have observed about the nature of the production  
11 itself and the additional information --

12 THE COURT: That would be \$250,000 at \$200 an hour,  
13 wouldn't it?

14 MR. JOFFE: I don't know what the going rate is for a  
15 contract attorney, I think it's less than that for doing for  
16 document review. I know that it can be done internationally, I  
17 know there are other ways to handle that. I'm not suggesting  
18 that it's not a large amount of money to do it that way, that's  
19 why we weren't able to do it.

03:22 20 But there are methods that can be used. That's the  
21 sort of the brute force method. Also, it would be absolutely  
22 feasible given the observations they've made about the nature  
23 of the documents, the source, and the information we've given  
24 them to cut a few thousand of them out -- actually, tens of  
25 thousands of them out just by saying these are documents we

1 don't think are useful.

2 THE COURT: Let me ask you this. So they serve  
3 document requests. All of this is produced in response to  
4 document requests, right?

5 MR. McGUIRE: Yes.

6 THE COURT: They produced -- they serve document  
7 requests, you respond lawyer-crafted answers to document  
8 requests that shape the scope of what might be produced,  
9 they -- one of you initiates a proposal for search terms  
03:22 10 because a lot of this stuff is going to be electronically  
11 retrieved.

12 MR. McGUIRE: Correct.

13 THE COURT: The 2,000 or so documents that are  
14 produced prior to this big production I'm inferring are  
15 produced by targeted review of a particular person's e-mail or  
16 a particular person's folder of documents or the paper file or  
17 something, so there might be a paper or electronic  
18 correspondence file about this problem, everything in it except  
19 for privilege goes over, and it's things like that that are the  
03:23 20 2,000 --

21 MR. McGUIRE: The low-hanging fruit.

22 THE COURT: The low-hanging fruit.

23 Then everything on all the servers is searched there's  
24 a discussion about search terms, those search terms are agreed  
25 to, search is getting a lot of hits, some discussion, boom,

1 it's done, and there's 770,000, and it's shipped over.

2 MR. McGUIRE: And there's one other step in there that  
3 I want to bring to the Court's attention, and that is that a  
4 bulk of those documents came from backup servers and images of  
5 people's hard drives that the client located late in the  
6 process of review -- of searching for responsive ESI materials.  
7 And by their nature, backup images of old computers and images  
8 within images that took a fair amount of time for us to sort of  
9 electronically unpack to get access to, required -- I think our  
03:24 10 vendor had to go out and buy a different piece of software in  
11 order to access it, but, in any event -- but there's a bulk of  
12 it that comes from ESI storage hard drives that ordinarily I  
13 think we might have said is not the sort of information that we  
14 should be expected to search, or we might have deemed to not be  
15 reasonably accessible because I think that in the ordinary  
16 course you would say the backup images from people's computers  
17 dating from years and years ago is not the sort of thing that  
18 you would ordinarily search as part of your ESI Protocol. But  
19 given the fact that there was an issue already sort of in play  
03:24 20 in this case about the fact that an e-mail migration by the  
21 company had caused some of the users' e-mails to not be copied  
22 over to the new server, we said --

23 THE COURT: No longer be available.

24 MR. McGUIRE: To no longer be available, we said we  
25 need to look to every available opportunity to find the ESI,

1 and, who knows, it's possible that some of those e-mails in  
2 fact will be recovered as part of looking through these old  
3 computer images. We didn't know because it was unclear looking  
4 at the actual names of the images and where they came from what  
5 they really represented except for a few of them. And so a lot  
6 of it is the result of sort of, I would say, taking an extra  
7 step or two to scrape out as much of the available ESI that we  
8 could to try to plug this gap.

9 Now, it is also true that it can be very easily  
03:25 10 ascertained and determined which portion of the bulk production  
11 is from those sources. And so one of the things that the  
12 defendants could do is they could say at the end of the day we  
13 think that those sources are not likely to have responsive  
14 documents, in the ordinary course of things they never would  
15 have been searched, let's start by looking at the data that was  
16 pulled off of the real servers, the current servers, the  
17 current e-mail from these various custodians and whatever we  
18 get, we see what we're left with.

19 THE COURT: So in what form is it produced?

03:26 20 MR. McGUIRE: It's all produced electronically with  
21 images with metadata associated with it.

22 THE COURT: So there was an e-mail that was pulled off  
23 somewhere, is that a document within the production?

24 MR. McGUIRE: Yes.

25 THE COURT: So each separate -- so there's 220,000

1 files that are produced, essentially.

2 MR. McGUIRE: Electronic files.

3 THE COURT: Electronic files. And each file is a PDF  
4 or --

5 MR. McGUIRE: It's a file, it is a .tif image with  
6 associated metadata, associated that it can be loaded in a  
7 review platform and organized and searched accordingly. All of  
8 the text of the document is searchable.

9 THE COURT: So it's all searchable.

03:26 10 MR. McGUIRE: And all of the senders, to, from, by  
11 date, the whole thing.

12 THE COURT: Okay.

13 Yes.

14 MR. SASO: Your Honor, so I think your Honor has asked  
15 at least two questions here, whether or not there is an  
16 obligation for a producing party to review their documents  
17 prior to production, and then, of course, what is the  
18 appropriate way to remedy the situation that we're in.

19 As to the first question, I think I would point the  
03:27 20 Court's attention to the ESI Protocol that the parties  
21 negotiated and agreed to.

22 First of all, on page 14 where it does read that the  
23 parties may use reasonable search terms to filter for relevancy  
24 prior to review and production. The understanding, of course,  
25 was always that the parties would use search terms just as a

1 way to locate responsive documents, not as a replacement for  
2 review.

3 Likewise, the Massachusetts Practice Series gives a  
4 discussion of what's appropriate for parties to do in  
5 negotiating an ESI Protocol, how to produce, what kind of  
6 format that the parties should produce, and it does state that  
7 even where parties reach agreement on the search terms, the  
8 producing party still needs to review the documents resulting  
9 from the search for responsiveness, and cites at least one  
03:28 10 case, this is in the Southern District of California, which  
11 makes clear that a party should not conflate a hit on the  
12 party's proposed search terms with responsiveness. The two are  
13 not synonymous. Search terms are an important tool parties may  
14 use to identify potentially responsive documents.

15 THE COURT: So you view it as a two-step process.  
16 Step one is you apply the search terms to get a potential  
17 universe of documents from which you might draw responsive  
18 documents. The search term hits might not be perfect, so there  
19 might be responsive documents that might not be ever be, in  
03:28 20 this case in the 770,000, 220 or 230 thousand documents, but  
21 those people are satisfied that's just the way the cookie  
22 crumbles unless they're in the low-hanging fruit pile which got  
23 produced in a different way. The likelihood of there being a  
24 particularly useful and meaningful responsive document outside  
25 the scope of search terms everybody lives with unless it comes

1 up in some other way. So step one is to do that, and step two  
2 is then some sort of review process. And there's essentially  
3 two processes that people can undertake, one is a human being  
4 can read all of the documents for responsiveness, or could read  
5 some number of them, or you could apply some -- what are they  
6 called "TAR"?

7 MR. McGUIRE: So TAR is, right, technology assisted  
8 review, and that is not a replacement for human review, it is a  
9 way for computers to start learning as humans are reviewing, if  
03:29 10 you keep seeing certain types of documents, like the ones that  
11 we've seen, like Groupon ads or discussions of Coke versus  
12 Pepsi. The computer starts learning that Coke is not relevant  
13 to this case.

14 THE COURT: So you might have human review, but  
15 instead of reviewing all 770,000 pages, you could review much  
16 less and you might only have to review 10,000 pages and then  
17 the TAR people would tell you that applying their algorithms  
18 they could tell you which are the responsive documents and you  
19 would only need to -- the value to get 90 percent of the  
03:30 20 responsive documents from viewing, say, 10,000 or what have  
21 you, you wouldn't need to review the rest, or the cost of  
22 reviewing the rest wouldn't be worth it.

23 MR. McGUIRE: It is a method by which parties review  
24 the production prior to production all the time. They will use  
25 TAR to do exactly that.

1                   THE COURT: Okay. So that's what you do when you  
2 produce documents.

3                   MR. SASO: Prior to production that is what -- if  
4 there is a large volume of documents, prior to production, the  
5 producing party can either do a cover-to-cover review of their  
6 documents with a human review, or they can use the assistance  
7 of technology assisted review and shrink the volume that  
8 they're reviewing prior to production.

9                   THE COURT: And you think that step two is what they  
03:31 10 should have done, whether they did it by human or TAR  
11 or any other method.

12                  MR. SASO: That's right. They certainly could have  
13 used TAR and shrunk the 700 -- now we're up to 790,000 pages  
14 now, and the computer may have shielded out the Groupon ads and  
15 the Coke versus Pepsi documents, and we would not have faced  
16 the burden that we are now facing.

17                  These are the types of things that parties should at  
18 least discuss, and that sort of leads me to what we were  
19 discussing here, too, as well, which is that I'm a little bit  
03:31 20 surprised to hear opposing counsel talk about the negotiation  
21 of the search terms, because we did negotiate the search terms.  
22 We initially proposed their search terms and they proposed our  
23 search terms. It was a highly negotiated back and forth.  
24 There was no lack of pushing back at the time. We definitely  
25 had a conversation back and forth about what search terms to

1 use. Of course that was sort of the theoretical, neither side  
2 had applied them yet to their ESI to know what number of hits  
3 they would receive.

4 Afterwards, we did receive a phone call from  
5 plaintiffs' counsel, and they've made some proposals about  
6 saying that we need -- it's a very small number of search terms  
7 that they asked to revise, maybe a handful or two that they  
8 wanted to revise. And I would think that our willingness to  
9 work with them on almost all of those search terms should have  
03:32 10 suggested to them that they should have continued to come to us  
11 if this was really a three-quarter-of-a-million page problem.  
12 They never, ever told us that this is the type of problem we  
13 were facing. They suggested some slight revisions, like moving  
14 within ten to within five in their search terms. And the only  
15 search term that we ever said that we think was appropriate  
16 where it -- and did not further revise it -- is "H3C," again,  
17 the one that plaintiffs' counsel brings up here. And that's  
18 because it's a critical issue. Our view was that every  
19 document that comes up with H3C would show that ICT -- and our  
03:33 20 initial review of the first two or three thousand pages show  
21 that ICT had H3C equipment in China that it was selling prior  
22 to it receiving any of the H3C equipment that it received from  
23 HPFS India.

24 THE COURT: How many documents and pages did you  
25 produce?

1                   MR. SASO: We produced approximately 3,000 pages, I  
2 believe.

3                   THE COURT: For the total production.

4                   MR. SASO: That's right. We may -- we recently  
5 produced a little bit more, but we may be around 4,000, three  
6 to four thousand.

7                   And, your Honor, if I may, sort of another example  
8 here is the reverse. We actually had search terms that they  
9 had proposed. One of them was "ITC," which was an expected  
03:34 10 misspelling of their company name, ICT. So we ran that search  
11 term, and we found out one of our custodians regularly does  
12 business or dealings with applications to the International  
13 Trade Commission. So we were receiving, not spam, but totally  
14 nonresponsive documents. And we thought we shouldn't have to  
15 review it. So we went to the plaintiffs and said, We're  
16 getting this back, can you work with us, you know, here's our  
17 proposed revision. We worked it out, and then we did not  
18 produce thousands of documents about the International Trade  
19 Commission.

03:34 20           And I would say, look -- and I appreciate that  
21 cooperation. It's certainly the cooperation I would have  
22 offered if they had told me that this is what we were looking  
23 at.

24                   But I'll tell you as well that if they had not  
25 cooperated and they said, No, I want you to run "ITC" against

1 all of your ESI, all of your custodians, I would have -- maybe  
2 not me personally, but I would have -- our associates would  
3 have reviewed every hit for "ITC" and they would have screened  
4 out the International --

5 THE COURT: I thought your partners never asked your  
6 associates to do what they wouldn't be willing to do.

7 MR. SASO: Let me tell you, I have done as many  
8 searches within -- I've been inside the ocean of spam myself, I  
9 will say that. I have been wading around in the 790,000 pages  
03:35 10 trying to find things. And I want to specifically -- look it,  
11 again, the point of "H3C" where we did not -- it was because we  
12 thought that we would get documents that actually relate to  
13 H3C. But, as you can see, even when you run "H3C," you get 50  
14 hits, the first 50 hits are from Alibaba.com that have nothing  
15 to do with this case.

16 If "H3C" returned 5,000 hits or 10,000 hits --

17 THE COURT: So what you think they should do is  
18 essentially the TAR review. In other words, if they had  
19 insisted on "ITC," you would have done one of two things, I  
03:36 20 take it. You either would have come to me and said, Judge,  
21 "ITC" is crazy, we see the theory of misspelling, but it's  
22 crazy because we deal with International Trade Commission, one  
23 of our custodians, and we're getting 100,000 hits in documents  
24 that International Trade Commission has nothing to do with it  
25 and the likelihood that anything relates to this is too low and

1       we can't come up with a solution like "ITC" and not something  
2       that might do it, and so don't make us do it. Or you would  
3       have done it, if you weren't able to reach some resolution --  
4       or you would have done it, if I said, "no," or if you didn't  
5       come to me, you would have done it and then you would have  
6       applied some TAR kind of process to try to wipe out all those  
7       documents, right?

8                    MR. SASO: Yes.

9                    THE COURT: And so why then, if you are correct that  
03:37 10       they should have done something like that, why aren't you  
11       saying, Judge, we'll just do that, and you, Judge, should shift  
12       the cost?

13                  MR. SASO: Your Honor, that -- we thought that that  
14       was actually the more extreme proposal here, that we could --  
15       we could do that and shift -- it would be, we believe, hundreds  
16       of thousands of dollars, as you already sort of guessed, to do  
17       something like that. But we are certainly open to that as a  
18       possibility. We can do a cover-to-cover review.

19                  THE COURT: But he said cover to cover --

03:37 20            MR. SASO: Or TAR-assisted review.

21                  THE COURT: I saw a presentation in a conference, I'll  
22       just tell you all of you, it's not that I'm some expert on TAR,  
23       but there was a presentation for judges at a judicial  
24       conference I was at and there were some people talking about  
25       TAR, and they were selling it as -- they're pitching it, not to

1 us to buy but as to sort of understand the world, as sort of  
2 the greatest thing since sliced bread, and that, you know, you  
3 do TAR review and you can save 90 percent of the cover-to-cover  
4 human cost, or I forget, but some monumental factor.

5 So if -- now I understand that in my seat of the  
6 pants, so to speak, a quarter-million-dollar calculation, the  
7 first variable is the rate and the second variable is the  
8 hours, and I assume the rate where you are is higher than the  
9 rate in Newton where Mr. McGuire is, and -- but, nonetheless --  
03:38 10 so, but even accepting that even with the benefits of TAR that  
11 it's a pretty -- it's pretty expensive, so you thought this was  
12 a cheaper solution.

13 MR. SASO: It is, and to be honest, we did not believe  
14 after our conference on June 10th that the Court was inclined  
15 to shift fees here, which is why when we were meeting and  
16 conferring, we were looking for other alternatives as well.  
17 But we are today certainly open to that as one of -- and many  
18 courts do that, right.

19 THE COURT: Sure.

03:39 20 MR. SASO: Courts will shift the attorney's fees,  
21 courts will sometimes require that the producing party index  
22 their production. There are also courts that have said that if  
23 you produce responsive documents in a data dump, that you --  
24 there are preclusive sanctions to say that you, as the  
25 producing party, are not entitled to use documents that you

1 dumped in half a million pages on the receiving party. So  
2 these are all different options open to the Court, and we are  
3 open to any and all of them.

4 After the June 10th conference, we went down the road  
5 of proposing --

6 THE COURT: What did I say in the June 10th conference  
7 that particularly shaped you this way? I've had a lot of  
8 conferences since June 10th.

9 MR. SASO: You know, I think -- maybe I'll defer to  
03:40 10 Mr. Callaghan then.

11 MR. CALLAGHAN: Your Honor, we were unable to obtain a  
12 transcript of that particular hearing, we'll get our hands on  
13 it, but my recollection is you used the word I'm "disinclined"  
14 to go down that road, when I suggested that it would take  
15 something like three months of four associates reviewing the  
16 documents to try to cull through and I gave calculations on I  
17 think on 10 seconds a page, and Mr. McGuire says he would apply  
18 20 seconds per document. I think we had already gone down that  
19 road and you indicated a clear inclination, at least on June  
03:40 20 10th, to pursue that line of reasoning.

21 THE COURT: I'd have to look back at the transcript  
22 just for the benefit of all of you, but I'm not sure if I was  
23 talking about -- I was disinclined to think about a massive  
24 extension which is -- I might have been thinking about  
25 extension, rather than anything about shifting costs, what have

1 you.

2 MR. CALLAGHAN: Then the misinterpretation was mine,  
3 your Honor.

4 THE COURT: I'm not saying that that's what I was  
5 saying without looking back at a transcript. But it certainly  
6 resonates with me on June 10th when I was talking with you I  
7 was not keen about the idea about what that would -- I would  
8 have inferred that to be a five- or six-month extension in  
9 written discovery before you got to anything else, and nothing  
03:41 10 else would happen until you finished that and that seemed to be  
11 a pretty substantial delay and I would be disinclined about  
12 that.

13 Generally, as a general proposition, A, this is an old  
14 case; and B, what underlies this case is the three people being  
15 imprisoned, and that seems like a significant issue, and so it  
16 shouldn't languish. No case should languish, but that's  
17 particularly important. So I would like to keep it moving.  
18 That's all.

19 So let me tell you just a couple things that I'm  
03:42 20 thinking about. I don't have a firm resolution in my mind.

21 I don't -- one thing I appreciate very much is you're  
22 all being very candid, both of you, and I really do mean I  
23 appreciate that. It's really helpful, and it makes both my job  
24 a lot easier, which I appreciate, but also, it means that -- it  
25 creates less issues when people are candid. And when people

1 aren't candid, it creates more problems and issues.

2                 The issue here, essentially, is who has the burden to  
3 review all these documents. And you're all being very candid  
4 about it and what did you and didn't, and you might not totally  
5 agree with how much push back there was or wasn't, but you had  
6 some discussions, I understand that, I don't think it totally  
7 turns on that.

8                 So this is what I'm thinking about. I don't see this  
9 as a sanction question, I'm not getting involved, and I know  
03:43 10 you're not asking for, like, preclusive effect about documents  
11 or anything like that.

12                 I think this is a practical question, and I think my  
13 general thinking about this is I'd like to solve this problem  
14 in a practical way. I don't -- there's something that rubs  
15 me -- it seems not right that you can produce massive amounts  
16 of -- knowingly produce massive amounts, large, large, maybe  
17 "massive" is unfair, large amounts of nonresponsive documents.

18                 I don't say that I think that you are -- that you are  
19 trying to bury them and hide the ball. I'm not saying it in  
03:43 20 that way. You're being very candid and upfront about what  
21 happened, and I don't view it that way. I'm just viewing it  
22 that what I think what happened is you said, okay, you want all  
23 that, you can have it, but you're going to get a lot of  
24 documents and we're not going to spend a lot of money to do a  
25 cover-to-cover human review and or to do a technology assisted

1 review and cull it down or we're not going to do something  
2 else, not because you were trying to dump it on them as a mess,  
3 a mess, that is not even quite right, but not trying to just  
4 give them a lot of stuff, but you didn't see a practical way to  
5 do it, so it's like, you want all that, you can have it all,  
6 but it's your problem. That's fundamentally what I see.

7 And it doesn't seem to me quite right that you can do  
8 that. I'm not sure that -- I think, essentially, there needs  
9 to be -- like there's too much -- it sounds to me like there's  
03:44 10 too many nonresponsive documents for you to just -- I  
11 understand those are the search terms they wanted, but I think  
12 there's some -- you know the system, and there's some  
13 obligation on you and your knowledge of the system that in some  
14 form along the way of the review to try to limit or  
15 eliminate -- not eliminate, you're always going to have  
16 nonresponsive documents in an electronic production, but limit  
17 that to some reasonable scope. So that leads me to feel like  
18 there's something you have to do to limit it. It's too much to  
19 just turn it over and lay it all on them, that there's some  
03:45 20 burden, responsibility, and obligation to match, like, we did  
21 the search terms but cull that in some way before you do the  
22 production.

23 I'm not sure -- the request they make about the  
24 indexing is what you propose, that might be a reasonable  
25 method, but there might -- I mean, I will tell you one thing I

1 thought about when I first read the papers, I haven't thrown it  
2 out there, I'm not -- I'm certainly not ordering it, I'm not --  
3 I probably wouldn't even do it right now if they asked for it.  
4 But it occurred to me was, like, okay, why shouldn't I just let  
5 defendants' technology providers, since you have some third  
6 party, they go into your people's servers and they'll do the  
7 search and produce it. But then I realized after rereading the  
8 papers and the letters that there's no quarrel about the  
9 electronic search. The quarrel is about after you have the  
03:46 10 documents, the production. So I don't see that as a  
11 necessarily viable, practical solution, and in I'll hear from  
12 you in a minute if you want to say something about that, maybe  
13 it is. But there has to be a better way. Let me give you an  
14 analogy from the old world when everything was in paper.

15 I had a case that recently settled that had to do with  
16 a dispute between some providers and an insurance company and  
17 the dispute was about a certain -- some number of claims for  
18 reimbursement submitted by the medical providers to the  
19 insurance company. In the old world, way back when before  
03:47 20 computers, they would have produced all the claim files. They  
21 would have gone in and said, Here's all the claim files. And  
22 if the insurance company had said, Well, the dispute is about  
23 all the claims that you made, you made these claims over ten  
24 years, we're not really sure, we don't have them indexed by  
25 provider, so here's one million claims, okay, we Xeroxed and we

1 put them in a warehouse, go have at it, and your 2,000 claims  
2 are in there, we don't know where they're in there, we're not  
3 hiding the ball, we don't know where the 2,000 are either. The  
4 only way we're going to be able to find them is we're going to  
5 go through them one by one. And that can't be right, there has  
6 to be a better way. And here there's a little bit of that  
7 feeling, not that you're -- I don't say you're intentionally  
8 doing it, but it has to with all this technology and with the  
9 fact that this isn't all coming from one source, right, it's  
03:47 10 coming from multiple custodians, multiple e-mail boxes. So I'm  
11 not sure whether this is something that is -- I guess there's a  
12 lot of different remedies to this, but I will be frank with all  
13 of you that, you know, I'm -- I have some facility and  
14 understanding with computers, but that's probably a dangerous  
15 thing for all of you because I've never personally supervised  
16 an electronic production of documents as a lawyer because that  
17 didn't exist when I practiced law. And so I understand this  
18 from proceedings like this and from conferences, and for me to  
19 dive in and, like, land in and say here's four things for you  
03:48 20 to do that I make it up, I'm not sure that's a good idea  
21 because I might break a lot of China along the way. I don't  
22 know what else there is. I could adopt their proposal, that's  
23 one thing, but you don't want me to do that, I don't think,  
24 that's my sense.

25 MR. MC GUIRE: I'm not sure that I fully understand

1 what their proposal is. When they say that they want us to  
2 index the entire production, I think what I hear them saying is  
3 that for every document request that they have made that we  
4 should go through the production and identify which Bates  
5 numbers within that production are responsive to that request.  
6 If that's what they're saying, that's far more than they would  
7 ever be entitled to receive as information in our position.

8 THE COURT: And I'm not deciding at the moment whether  
9 I'm going to order what they ask for.

03:49 10 MR. McGUIRE: But I want to make sure I understand  
11 what it is that they ask for. Because I can say that in  
12 response to the problem --

13 THE COURT: I'm going to give you a better chance to  
14 understand what they say for then this courtroom, because the  
15 back and forth in the courtroom is not the best way for them to  
16 explain to you what they want. It would be --

17 MR. McGUIRE: I understand that. I just want to make  
18 the Court aware of what we have attempted to this point.

19 THE COURT: Okay.

03:50 20 MR. McGUIRE: That includes their Exhibit B, in which  
21 we provided for the requests either where there was a question  
22 about whether or not such documents had even been produced, we  
23 provided Bates numbers illustrating that some of them had; and  
24 for those requests where it was easy for us to describe the  
25 entire Bates range where those documents were, we did so. So,

1 for example --

2 THE COURT: Were those illustrative or exclusive  
3 answers?

4 MR. McGUIRE: For many of them, they're illustrative;  
5 for some of them, the ones we can do easily, it's exclusive.  
6 In other words, where they say where are the social media  
7 posts --

8 THE COURT: Did those answers note when they're  
9 exclusive?

03:50 10 MR. McGUIRE: I think the language was clear in each  
11 flavor.

12 THE COURT: I don't recall seeing anything that seemed  
13 to say they were exclusive.

14 MR. McGUIRE: You don't recall seeing any that were  
15 exclusive?

16 THE COURT: I don't recall that.

17 MR. McGUIRE: I agree it's few, but there are some.

18 Then we provided them with, for each production that  
19 was made, a list of the custodian and source folder as it  
03:51 20 existed on the electronic library from which it was culled and  
21 how many documents and the Bates range for each of those  
22 things.

23 So I don't really understand how that is not an index  
24 of the production in that it describes for every given Bates  
25 range and every folder where it came from within our source

1 material.

2                 Beyond that, it's not clear to me what else we could  
3 do or would be obligated to do to help them understand the  
4 contours of this production. And if it's a question of  
5 conducting searches within that to find relevant documents, I  
6 think one of the things that you can observe is they're at  
7 least as able to do that as we are. They could use TAR, they  
8 could modify the search terms themselves. They've been given  
9 the universe of every H3C document that we had that was a hit.  
03:52 10 If they wanted to say if we had gone back in time and agreed  
11 here's a narrower search term, they can conduct that search  
12 right now.

13                 We honestly thought, your Honor, that we were, to some  
14 degree, doing them a favor by providing them with the full  
15 universe of documents responsive to their search terms such  
16 that they can conduct whatever searches they want within it.

17                 THE COURT: This is what doesn't feel right. You have  
18 a lawsuit between A and B, and A says, B, from your computers  
19 produce every document that relates in the relevant time period  
03:52 20 to my business, okay. It's a business. And B does the search.  
21 And because A's business is called Joe's Auto Body, all right,  
22 there is lots and lots of things that are going to come up with  
23 reasonable search terms to capture the responsive documents  
24 that are unresponsive. And B has never deleted an e-mail in  
25 his life because Google provides unlimited storage, so why

1 would he ever delete an e-mail? So there's millions of stuff.  
2 And you can't -- I don't think B can just turn it over and say  
3 we're in the same position, either one of us can do a review  
4 for responsiveness, either one has the same technology  
5 available. True, right. I think B has some obligation to cull  
6 the production, even if it's not done intentionally to like  
7 obscure where things are.

8 So my sense is here there are too many nonresponsive  
9 documents and that something needs to be done. And the fact  
03:53 10 that you've answered about the document requests tells them  
11 something but most of them are not exclusive answers, so it  
12 doesn't answer whether -- where all of the responsive documents  
13 are, it just tells them where there are at least some  
14 responsive documents.

15 MR. McGUIRE: Confirmed that they were produced.

16 THE COURT: Confirm that you did produce something,  
17 and it gives them some start to find responsive documents but  
18 nowhere near identifying all of the responsive documents.

19 So it seems like there's some obligation, the contours  
03:54 20 of which I'm not sure, and I don't know that in this case I  
21 have to define in some legal opinion precisely, but of  
22 producing responsive documents. It's not enough.

23 So I'll just tell you what I'm thinking about. What  
24 I'm thinking about is that the two of you talk to each other,  
25 some of it I'd suggest happen now, but you can do it -- I can

1 give you a short amount of time but you don't have to do it  
2 right now if you don't want to. A, to the extent you don't  
3 understand or you think there's problems with their proposal,  
4 you can explain it and answer and have a discussion back and  
5 forth, if necessary, and you see whether there's any narrowing.  
6 And then you submit to me, maybe in a week, maybe less than a  
7 week, but no more than a week, I think, a joint statement that  
8 tells me this is what you want, defendants, and this is what  
9 you want them to do, explain what you want me to do, why it is,  
03:55 10 why you think that's reasonable and what's involved. And you  
11 tell me what either -- why you shouldn't have to do that, if  
12 you propose something else, what you propose or nothing need be  
13 done because of what you've already done or what have you.

14 And then I'll read it, and then I will do one of two  
15 things: I'll either do -- any of you baseball fans? Judge  
16 Young regularly does this, I don't regularly do this, in fact,  
17 I've never done it, but it's possible I would do it here.  
18 Baseball arbitration. Baseball arbitration, the player and the  
19 club go in before the arbitrators. Player comes in presumably  
03:55 20 higher, teams's in presumably lower. Arbitrator picks the most  
21 reasonable number, not any other. So one possible thing is  
22 I'll just look at it, what seems like the most reasonable  
23 proposal, and I'll pick that one. It could be do nothing  
24 because, given what you've done and given what's involved  
25 nothing more -- the most reasonable proposal is nothing, or it

1 could be what have you.

2                 Alternatively, I might do what I ordinary do, which is  
3 I look at them, I might pick yours, I might pick yours, and I  
4 might fashion my own depending on the circumstances; not  
5 promising that I'd do baseball arbitration. But mostly I'm  
6 trying to solve this problem. In other words, what I'm looking  
7 to do here is you have a burden, I think, to produce the  
8 responsive documents and not sort of include with it,  
9 unintentionally, I'm not finding any -- so far I don't see any,  
03:56 10 like, intentional effort to swamp them, but to -- to reasonably  
11 produce responsive documents and cull out the others. It  
12 doesn't have to be perfectly, but reasonably so. And so I'm  
13 looking for a reasonable solution to that problem, because when  
14 they get the documents, they should be able to start reading  
15 the documents and mostly be reading things that seem reasonably  
16 responsive to one of their requests. And so how perfect, I  
17 don't expect perfect.

18                 MR. JOFFE: Your Honor, may I just add one  
19 consideration in this?

03:57 20                 THE COURT: Sure.

21                 MR. JOFFE: In your effort of crafting a solution,  
22 which we're grateful for, but one of the issues that we haven't  
23 discussed is the resources of the parties. It's not just that  
24 plaintiffs decided, you know, we're not going to review  
25 anything and dump a bunch of nonresponsive documents on

1 defendants, that's not what we did. As we discussed, we've  
2 collected as much as we could. And one reason we have so much  
3 compared to, for example, defendants is our obligation was to  
4 look for documents until the present time, whereas they looked,  
5 I think, until the beginning of the lawsuit or even before  
6 that. So that included several recent years, which includes a  
7 lot of additional documents. But that's one of the potential  
8 crafting solutions of how to --

9 THE COURT: So let me say two things. One, as a  
03:58 10 general proposition, if I think a well-heeled party is taking  
11 advantage of their wealth to stymie the ability of a less  
12 well-heeled party to vindicate their claims, then I will try to  
13 do something to be sure that the less well-heeled party will be  
14 allowed to have their day in court. However, so far this  
15 dispute doesn't strike me, this narrow dispute before me,  
16 doesn't strike me as that, number one.

17 Number two, the solution to that ordinarily -- for  
18 example, I had a case recently where a well-heeled party said  
19 we would like to see every, every Uber transaction for the last  
03:59 20 ten years by each of the parties they were suing, and without  
21 regard to whether it related to business -- it was a business  
22 litigation -- within the scope of the ten-year time period, the  
23 case was about a ten-year time period, within the scope of the  
24 ten years, but other than that, they wanted every Uber  
25 transaction, every text message, every cell phone, the

1 record -- there were no recordings -- but they wanted every --  
2 the list of every call made, number of calls for ten years.  
3 And without any limitation on relevance to, like, business, the  
4 claims, anything. That, in my view, struck me as grossly  
5 overreaching.

6 MR. JOFFE: That's what the defendants have asked to  
7 do --

8 THE COURT: The answer to that, when that happened,  
9 was there was a motion by the defendants to say, Judge, that's,  
04:00 10 like, unreasonable. We shouldn't have to -- we move to --  
11 like, we're not answering that request -- some of these were  
12 third-party subpoenas, they moved to quash the third-party  
13 subpoenas. But they didn't produce all of the documents and  
14 then say -- so if the request is too broad, in other words, if  
15 it's an onerous request, the answer is to challenge the  
16 request, not to challenge after the request the scope of the  
17 documents. I'm not deciding now whether it's too late to  
18 challenge the scope or not.

19 In other words, if they asked for every Uber text  
04:00 20 message, what have you, it seemed like, in that case, it was  
21 unreasonable, then you come to the Court and say, Judge, it's  
22 unreasonable, that's too much, that's not proportional to the  
23 case, it's not proportional -- at least today in front of me, I  
24 don't have a dispute like that. I have a dispute that there's  
25 responsive documents they sought that are reasonable to seek

1 and obtain, so if -- and the question is there's a lot of  
2 unresponsive documents mixed in, and you're just telling me  
3 that they should have to pay for it because they're rich, which  
4 clearly HP, I would infer, has a lot more money as a general  
5 proposition than your client. I don't think that's a fair  
6 basis to shift the costs. I don't think that a well-heeled  
7 party is forced to bear the burden of the litigation brought by  
8 a less well-heeled party. The well-heeled party's not allowed  
9 to squash the less well-heeled party by onerous requests, but I  
04:01 10 don't see this necessarily as that.

11 Now, if you persuade me that you're reasonable  
12 culling, it's not -- I would say one the other reasons I'm  
13 hesitant is the plaintiff, as we all know, Mr. Joffe, is the  
14 master of his complaint, right, and -- in many ways. And this  
15 case began, I will remind you, with a very, very broad --  
16 actually, it did not begin, it began with a very focused  
17 complaint brought by counsel for ICT, it then -- pfmmmfph -- I  
18 don't know if the appellate record, if it ever reaches the  
19 Court of Appeals, will memorialize "pfmmmfph" and what that  
04:02 20 means in the physical expression that I've given it -- but  
21 that's what happened in the complaint you filed. And you sued  
22 people who, in my judgment, I warned you under Rule 11 that you  
23 had no basis, I didn't think, suing certain people, and I  
24 specifically warned you that, and I denied the motion to amend  
25 on a technical procedural ground. I gave you the chance to

1 amend again, and what you filed again, if I recollect, was  
2 precisely the same thing. And you disregarded that pretty  
3 clear express warning. And I bring that up because the  
4 beginning and foundation of this case was sort of overbroad,  
5 and it doesn't -- I take seriously that three of your clients  
6 went to prison, and that's a serious matter, but, you know --  
7 and now -- I narrowed the complaint, I think, to some degree  
8 you still have a lot of claims in there.

9 So I don't know at the moment as I sit here now  
04:03 10 whether their discovery requests are overbroad or not, but it  
11 comes out of a history in this case where you were seeking a  
12 lot, seeking to sue a lot of people on very broad theories,  
13 some of which I've allowed to persist, some of which I didn't.  
14 And so the well-heeled argument, you want to come in and say,  
15 Look, these requests, like this Uber text message I gave you  
16 before in another case, you can make that motion, I'll look at  
17 it, and I'll take it seriously. But right now we're talking  
18 not about whether requests were overbroad; we're talking about  
19 you produced documents you concede are responsive and within  
04:04 20 them are a large -- "large" was the word you used -- large  
21 number of documents not responsive, that's what Mr. McGuire  
22 said. And the question is who bears the burden of clearing  
23 that. And if the only basis to shift is that HP is a Fortune  
24 100, Fortune 500, Fortune 10, I don't know, whatever they are,  
25 they're a big company, big publicly traded company, and your

1 client isn't, I don't see that as a basis. That's no more a  
2 basis than if you came in and said, Judge, it's going to cost  
3 our client \$25,000, \$125,000 to hire -- you hired a third-party  
4 to do this right, extract the documents.

5 MR. McGUIRE: Of course we did.

6 THE COURT: You paid them some amount of money, you  
7 don't have to tell me, I assume it's at least 10 or 20 thousand  
8 dollars, it easily could have been way more than that. If you  
9 came in to me and said, They're rich, we shouldn't have to pay  
04:05 10 for that, to pay for that, I would say, No, you have to pay for  
11 your own production. And you didn't ask for that, I understand  
12 that, but this sounds in the same nature.

13 MR. JOFFE: It's not exactly in the same nature, your  
14 Honor, because we negotiated the ESI Protocol and search terms,  
15 and we had no conception of how many documents those search  
16 terms will produce until after we've collected all the  
17 electronic data, loaded it, convert it and run the search  
18 terms, and then we ended up with over 200,000 documents on our  
19 hands. And then the question --

04:05 20 THE COURT: But there are two ways to look at this.  
21 One way to look at this is this is a problem to be solved, and  
22 I have no doubt, I am certain that it can reasonably be solved,  
23 okay, without spending hundreds and hundreds of thousands of  
24 dollars, having human beings review what everyone says is large  
25 number of irrelevant documents.

1                   MR. JOFFE: My clients don't have hundreds of  
2 thousands of dollars to review those documents, they simply  
3 don't.

4                   THE COURT: I'm not asking you to. You're not  
5 listening me, or you're listening but you're not hearing.

6                   What I'm saying is it doesn't require -- obviously, if  
7 you have human beings review every one, it's going to cost  
8 hundreds of thousands of dollars. What I just said was it can  
9 be solved without doing that, without, without, that means it's  
04:06 10 not done, right.

11                  MR. JOFFE: Okay.

12                  THE COURT: Right, yes?

13                  MR. JOFFE: Yes, your Honor.

14                  THE COURT: That's what "without" means.

15                  So it's not required to do that.

16                  There is a way to solve the problem, okay. Dumping it  
17 all on them doesn't strike me as a solution to the problem.

18                  What I'm going to do is, I think it's a problem, I  
19 think that it can be practically solved without somebody  
04:06 20 spending half a million dollars doing a review to find  
21 thousands of documents from Alibaba that are junk e-mails. So  
22 your choice that all of you -- you're going to confer with each  
23 other, file by next Friday a joint statement along the lines I  
24 described, telling me basically just how do you propose solving  
25 the problem. That's what I want to know. That's all I'm

1 interested in, how do you propose solving the problem and why  
2 do you think this is a reasonable solution to the problem.  
3 Okay. You tell me what you want, why it's a reasonable  
4 solution. And you can tell me exactly what your proposal is  
5 that you've already proposed, that's fine, I'm not saying it's  
6 not reasonable. Just tell me what it is, why you want it. And  
7 he says he doesn't understand it, maybe he does, maybe he  
8 didn't, maybe you've heard about it. I'm not interested in  
9 whether you've talked about it before, I don't care.

04:07 10 Where you said you don't fully understand it,  
11 Mr. McGuire, now is your chance to ask them after court, not in  
12 front of me, what it is and what you don't understand. Because  
13 when it's done next Friday, I'm going to be hard pressed to  
14 believe that you don't understand it, unless you can explain to  
15 me very specifically why there's something about it you don't  
16 understand.

17 And what I'm interested in is you either both propose  
18 a -- you can propose the same proposal, fine, I'll probably do  
19 that; you can propose separate ones, you don't have to agree,  
04:08 20 that's up to you. But I just want to know how you reasonably  
21 propose solving the problem.

22 And this is not the first time that this ever came up,  
23 to deal with a problem like this. How do you reasonably  
24 propose solving it, or if you think you've done enough, then we  
25 don't need to do anything because here's what we did. I'll

1 look at it, and then I'll decide. Okay?

2 And then there's another issue. Just timing,  
3 scheduling. So there's no way -- I concede to reality, that  
4 July 22nd is not fair as a motion to compel date when there was  
5 770,000 pages that might possibly require human review. Even  
6 if you were doing some other review, it would still be pretty  
7 tight to do motions to compel on July 22nd. So I think  
8 separate and apart from this, in the same joint report, what  
9 the two of you should propose is how do you propose revising  
04:09 10 the date. And I see two solutions, and I leave it to you to  
11 figure it out with each other, you can have one proposal or you  
12 can have separate, just what do you propose, no more than a  
13 paragraph, to explain why you want what you want. One is we  
14 could say July 22nd for all motions to compel other than  
15 motions to compel that arise out of the 770,000 pages and  
16 issues related to that, and then you can propose some other  
17 date for that. Alternatively, you could say July 22nd for  
18 plaintiffs and some other date after the 770,000 for you, or  
19 you could say one further date for both of you. You think  
04:09 20 about what makes the most sense and propose whatever you think.

21 MR. SASO: Your Honor, the only thing that  
22 scheduling -- and I understand the proposals for addressing the  
23 motion to compel -- the one thing I think you actually opened  
24 with was scheduling issues, and I think it's probably  
25 worthwhile just to bring to your attention that the problem

1 remains, not so much that the data dump was late, and it was  
2 two months after the deadline for production, the plaintiffs  
3 still have not completed their document production and have not  
4 provided their privilege log. So -- and although there were  
5 deadlines set at the June 10th conference when we were here  
6 about a month ago, and so -- I mean, one solution is that  
7 those -- a proposal could be that we just aren't required to  
8 make a motion to compel about documents we haven't yet received  
9 or a privilege log we haven't yet received, or perhaps -- I  
04:10 10 don't know if there is something that the Court wants to do  
11 today about those deadlines.

12 THE COURT: So what I don't understand -- I understand  
13 this is hard and your client isn't rich, but, like, you're the  
14 plaintiff. And presumably, you want to obtain judgment. And  
15 so this case -- the only solutions that I can foresee are  
16 either at some point I just say it's done, and if you didn't  
17 produce it, you can't rely on it and you run the risk of an  
18 adverse inference if it's not clear that you did all the  
19 production you were required to do. Or I can say all motions  
04:11 20 to compel about what there is but any motions to compel that  
21 arise out of what you later produce based on what you later  
22 produce, they get to do it then. And -- or some other -- those  
23 are the only two solutions I know of.

24 I'm not looking to create preclusive effects and  
25 adverse inferences because I much prefer cases to be decided on

1 the evidence and the merits, and that to me is an important  
2 consideration and it's the better way to do things. But  
3 just -- your clients -- this case, first of all, has to end at  
4 some point because all cases come to end. But the other is  
5 there's some important issues at stake and we need to get it  
6 done and move forward, and you can't move forward until all the  
7 document production is done. So I guess the question is when  
8 are you going to be done?

9                   MR. JOFFE: Well, your Honor, the additional documents  
10                  that we're discussing, with the privilege log, we're reviewing  
11                  the documents --

12 THE COURT: So when? One word, a date, when is the  
13 privilege log going to be done?

14 (Discussion off the record.)

15 THE COURT: I'll tell you what, I'll tell you what,  
16 you can tell me in the report next Friday --

17 MR. JOFFE: Thank you, your Honor.

18                   THE COURT: -- when the privilege log is going to be  
19 done, when the document production is going to be done, other  
20 than subject to whatever I order about culling, but, like, what  
21 you've produced, all responsive documents, even if it includes  
22 nonresponsive.

23 I will tell all of you one of the things in the back  
24 of my mind in about this case, I haven't done it because of the  
25 way we've been proceeding -- step back. Ordinarily at a Rule

1       16 conference, I do not schedule trials. And the reason I  
2       don't schedule it -- and there's some judges who have a  
3       different view, you should schedule a trial date in every case.  
4       Judge Young's view, you should schedule a trial and you manage  
5       the trial date, and that's the date and you're going on that  
6       date. I don't do it that way for various reasons, although I  
7       respect -- I think there are a lot of good reasons he does it  
8       his way. But a lot of judges set trial dates, nonetheless, at  
9       Rule 16s. I don't do that because I feel like the dates I set  
04:13 10      for trial should be real dates. So my ordinary practice is to  
11      set a date for trial in one of three circumstances: You tell  
12      me at the end of fact discovery there's no summary judgment  
13      motion, we pick the trial date then. Two, you're done -- I  
14      rule on summary judgment and I deny the summary judgment  
15      motion, I know there's going to be a trial, I set the trial  
16      date. Three, in some small number of other cases, either at  
17      the outset the lawyers tell me, Judge, it's a definite trial,  
18      we need a date, let's pick a date 18 months, we know how long  
19      it will take, or there's a case I think that it needs a trial  
04:14 20      date to manage against.

21                  You're not in the other categories, you might be --  
22                  you're in the category where I think I should just set a trial  
23                  date at some date, not an unreasonable trial date, not November  
24                  1st, I'm not going to do something like that. A date that's  
25                  reasonable now looking forward to let you do all the things

1 you'd need to do to prepare your case. But sometimes people  
2 misunderstand the fact that I didn't set a trial date with the  
3 idea that it might not ever go to trial. People who have that  
4 understanding are deeply misguided because I move the cases.  
5 And as you can see, with the exception sometimes of motions to  
6 dismiss, I very much try to resolve things very quickly,  
7 because I think parties are entitled to have their cases move  
8 quickly. So I expect this case -- this case is going to go to  
9 trial unless they make a winning summary judgment motion or all  
04:15 10 of you settle it, but I'm thinking we're going to trial. And I  
11 don't know if they're going to make a motion or not, and I  
12 don't know if it will win even if they do.

13 So the reason I bring this up is it's a definite and  
14 firm date, is something that imposes a certain discipline on me  
15 and on all of you. And it's something that comes to mind as we  
16 sit here struggling to finish paper discovery in the summer of  
17 2019 in a case filed in December 2016, so it was really January  
18 2017. Or was it 2015? 2015 in state court and removed. So  
19 it's filed in December 2015. So a long time ago. So that's  
04:15 20 been in my mind for some time in this case, that I should do  
21 that. And I tell all of you not to -- just tell you how I'm  
22 thinking this case has to keep moving and we have to reach a  
23 trial of this matter after a fair litigation, after fair  
24 opportunity to take the discovery you need and to make the  
25 motions you do and with cognizant recognition of the parties'

1 resources and ability to prepare the case in a reasonable way.  
2 I want you to have the opportunity to do that, and I'm thinking  
3 about that. But we're going to try the case, and so you need  
4 to think about that. And you should understand that if I do  
5 set a trial date, I have reserved that time special just for  
6 you, and I don't do what Judge Young does, I respect him for  
7 it, but I don't schedule five cases for the same day. If I  
8 think it's a two-week trial, I'm going to mark out in my  
9 calendar those two weeks just for you. So then that means  
04:16 10 I'm -- we're going to do that date, unless there's something  
11 extraordinary.

12 So I'm just -- it needs to keep moving because what do  
13 you say to your clients who are suing that, like, the discovery  
14 deadline was in April and we still haven't done all our  
15 discovery yet? So that's delaying the case. I assume they're  
16 asking those questions, and I assume you're regularly meeting  
17 with them and telling them. And I will tell all of you that  
18 sometimes I require parties to come in because I do think  
19 sometimes it's helpful for parties to hear from the judge, and  
04:17 20 I will tell them my views of the case of where it is and  
21 explain everything, because I think the parties are entitled to  
22 transparency, and I do it in criminal cases, too.

23 So -- and I say that just because, like, all I really  
24 want is you to move the case forward so I can resolve whatever  
25 motions are brought to me on the merits and we either can

1 resolve this case on a dispositive motion, if they make one and  
2 it has merit, and you can appeal if I'm wrong, or we resolve  
3 it. If they don't make it or they do make it and it loses,  
4 it's a trial and the jury can resolve it. That's what I'm  
5 trying to do it, but you have a part in that. You've got to  
6 keep it moving. Okay.

7 Have a nice weekend; I'll await the report.

8 THE CLERK: Court is in recess. All rise.

9 (Court adjourned at 4:18 p.m.)

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11 CERTIFICATION

12 I certify that the foregoing is a correct transcript  
13 of the record of proceedings in the above-entitled matter to  
14 the best of my skill and ability.

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18 /s/Debra M. Joyce  
19 Debra M. Joyce, RMR, CRR, FCRR  
Official Court Reporter

July 18, 2019  
Date

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